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IJM CONSTRUCTION SDN BHD v. LINGKARAN LUAR BUTTERWORTH (PENANG) SDN BHD

HIGH COURT MALAYA, SHAH ALAM
SEE MEE CHUN J
[ORIGINATING SUMMONS NO: BA-24C(ARB)-1-01-2017]
4 JULY 2017

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CIVIL PROCEDURE: *Arbitration – Res judicata – Trust monies – Application for retention monies to be deposited into separate fixed deposit accounts – Earlier application to arbitrator dismissed – Whether plaintiff's application rendered res judicata – Whether retention monies being trust monies required to be kept in separate fixed deposit accounts – Arbitration Act 2005, ss. 11(1)(e), (f), (g), 19*

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The defendant appointed the plaintiff as a contractor for work on the Butterworth Outer Ring Road. Three separate contracts were awarded under ss. 1, 2 and 3 of package 1B of the project. The plaintiff filed the present application *vide* ('encl. 1') for an order for the defendant to deposit retention monies into a separate fixed deposit account in three separate fixed deposit certificates. The defendant contended that due to the plaintiff's earlier application to the arbitrator being dismissed, the present application by the plaintiff was rendered *res judicata* and thus s. 11 of the Arbitration Act 2005 ('the Act') precluded the making of such application. The issue that arose for consideration was whether retention monies being trust monies were required to be kept in separate fixed deposit accounts.

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Held (dismissing encl. 1):

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(1) The plaintiff was entitled to file the present application pursuant to s. 11(1)(e), (f) and (g) of the Act even though the arbitrator had dismissed the plaintiff's application in the arbitration proceedings. Section 11(2) of the Act allows the High Court to grant any interim measure where an arbitral tribunal has already ruled on the same application. Thus, the application made by the plaintiff under s. 11 of the Act after the arbitrator refused its application under s. 19 of the Act was in order. *Res judicata* could not be applied to the extent of nullifying or defeating the express provisions of ss. 11 and 19 of the Act. (paras 10, 11 & 13)

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(2) The winding up proceedings against the defendant was not ground for keeping the monies in separate accounts as the retention monies could be traceable. Although the retention monies were trust monies it did not necessarily mean the monies must be kept in separate accounts. (paras 26 & 30)

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Case(s) referred to:
Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd [2010] 1 LNS 1834 HC ***(refd)***
Concorde Construction Co Ltd v. Colgan Co Ltd (1985) 29 BLR 120 ***(refd)***
ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd [2004] 4 CLJ 674 CA ***(refd)***
Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor [2011] 8 CLJ 269 CA ***(refd)***
Re Benson [1899] 1 Ch 39 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 11(1)(e), (f), (g), (2), 19(1)(d)

For the plaintiff - GH Tee; M/s GH Tee & Co
For the defendant - Faisal Moideen & Nereen Kaur; M/s Moideen & Max

Reported by Sandra Gabriel

JUDGMENT

See Mee Chun J:

Introduction And Parties

[1] Enclosure 1 is an application by the plaintiff for, *inter alia,* an order for the defendant to deposit retention monies into a separate fixed deposit account in three separate fixed deposit certificates.

[2] Plaintiff was the contractor appointed by defendant for work on Butterworth Outer Ring Road. There were three separate contracts awarded under ss. 1, 2 and 3 of package 1B of the work.

Background Facts

[3] The retention monies in question comprises the following:

(i) retention money under s. 1 contract - RM1,782,533.10;

(ii) retention money under s. 2 contract - RM1,704,250; and

(iii) retention money under s. 3 contract - RM927,500.

Exhibits "PA.3.1, 3.2 and 3.3" show the amounts.

[4] There is a pending arbitration between parties where plaintiff claimed *inter alia* for the release of the retention monies. In its defence and counterclaim, defendant had in its para. 15 admitted to retaining RM1,782,533.10 and in para. 49 to retaining RM1,704,250 and stated in those aforesaid paragraphs any amount found to be payable shall be subject to set-off and counterclaim. The set-off and counterclaim are essentially for defects in plaintiff's work, failure to complete within time and defendant's entitlement to liquidated and ascertained damages.

[5] Plaintiff had applied to the arbitrator in the arbitration proceedings for an order the retention monies be maintained in separate fixed deposit accounts. This was refused by the arbitrator in his decision dated 22 July 2016 (exh. "PA9").

[6] There is also a winding-up petition filed by plaintiff against defendant arising from a separate suit. The winding up is on a demand made pursuant to a consent judgment dated 17 October 2013. Defendant's applications to set aside the consent judgment and strike out the winding up petition were dismissed by the High Court and the appeals are pending.

Application Of Section 11 Of Arbitration Act 2005

[7] It was defendant's contention that the present application by plaintiff was rendered *res judicata* due to its earlier application to arbitrator being dismissed and s. 11 of Arbitration Act 2005 (AA) thus precludes the making of such an application.

[8] The present application is made by the plaintiff pursuant to s. 11(1)(e), (f) and (g) of the AA. The aforesaid provision states as follows:

> Arbitration agreement and interim measure by High Court
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> 11(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and High Court may make the following orders for:
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> ...
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> (e) securing the amount in dispute;
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> (f) the preservation, interim custody or sale of any property which is the subject-matter of the dispute;
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> (g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and
>
> ... .

Pursuant to the above-aforesaid provision, it is clear the High Court has jurisdiction and power to make the order which plaintiff now seeks.

[9] The power of arbitrator to order interim measures is conferred by s. 19 of the AA. Specifically s. 19(1)(d) states as follows:

> 19. Power of arbitral tribunal to order interim measures
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> (1) Unless otherwise agreed by the parties, a party may apply to the arbitral tribunal for any of the following orders:
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> ...
>
> (d) the preservation, interim custody or sale of any property which is the subject-matter of the dispute.

[10] The opening sentence of s. 11(1) expressly provides that the application to the High Court for interim measures may be made "before or during arbitral proceedings". Section 11(2) of the AA then provides that "Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the

application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application". Therefore, the plaintiff is entitled to file this application pursuant to s. 11(1)(e), (f) and (g) of the AA even though the arbitrator has dismissed the plaintiff's application in the arbitration proceedings. Section 11(2) of the AA allows the High Court to grant any interim measure where an arbitral tribunal has already ruled on the same application.

[11] In *Cobrain Holdings Sdn Bhd v. GDP Special Projects Sdn Bhd* [2010] 1 LNS 1834 the court stated the grounds for interim measures in s. 11 AA overlaps with the grounds found in s. 19. The court then stated at p. 9:

> Thus there is a clear overlap between section 11(1)(a), (b), (c) and (f) with section 19(1)(a), (b), (c) and (d). Going by the basic principles as stated earlier, where there is a concurrent jurisdiction, a party should first apply before the arbitral tribunal, unless there are countervailing factors, since the role of the High Court is to "support arbitration"... .

Thus the application made by the plaintiff under s. 11 of the AA after arbitrator refused its application under s. 19 of the AA is in order.

[12] There is nothing in AA which stipulates that the arbitrator's exercise of powers under s. 19 shall be to the exclusion of the court's exercise of powers under s. 11, nor any statutory provision to the effect that the arbitrator's decision under s. 19 is final and binding upon the court. Section 11(2) by specifically limiting the conclusiveness to the arbitrator's findings of fact, would imply that the part of the arbitrator's ruling or decision on interim measure other than the findings of fact are open to reconsideration and fresh decision by the High Court under a s. 11(1) application.

[13] It follows this court has the power to hear the application under s. 11 and *res judicata* cannot be applied to the extent of nullifying or defeating the express statutory provisions of s. 11 and s. 19.

Whether Retention Monies Constitute Trust Monies And Whether It Ought To Be Kept In Separate Fixed Deposit Accounts

[14] *Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor* [2011] 8 CLJ 269; [2012] 3 MLJ 422 is clear authority a trust can be created even in the absence of an express provision for trust and that retention monies by their very nature and purpose are trust monies. Refer to p. 282 (CLJ); p. 432 (MLJ) where the Court of Appeal stated:

> ... right in law and in fact in holding that the retention monies by their very nature and purpose, are trust monies, held by the appellant as trustee for the respondents. The respondents are the beneficial owner of the said monies. The monies are held back by the appellant (as employer) only for a specific purpose, and not on the basis whether there was an express provision for trust. In the circumstances, the retention monies held by the appellant must be held in its capacity as a fiduciary to the trust for the respondents ... .

A It was also not disputed by defendant's counsel that retention monies are trust monies but rather whether it be kept separately.

[15] The larger issue is whether the retention monies being trust monies are required to be kept in separate fixed deposit accounts.

B **[16]** Date of practical completion for s. 1 work was 18 October 2005 and date of expiry of defects liability period (DLP) was 18 October 2007, for s. 2 work practical completion was 27 January 2006 and expiry of DLP was 27 January 2008 and for s. 3 work practical completion was 9 May 2006 and expiry of DLP was 9 May 2008 (exhs. "PA 4.1, 4.2 and 4.3").

C **[17]** The respective contracts for ss. 1, 2 and 3 work had an identical clause on retention monies as per cl. 65(e). Clause 65(g) further provides that one-half of the retention monies shall become due on issuance of certificate of practical completion of the whole work and the balance one half on the expiry of DLP for the whole work.

D **[18]** Plaintiff had relied primarily on *Qimonda (supra) Concorde Construction Co Ltd v. Colgan Co Ltd (1985)* 29 BLR 120 and *ESPL (M) Sdn Bhd v. Radio & General Engineering Sdn Bhd* [2004] 4 CLJ 674 as authorities that an employer who holds the retention monies is under a duty to deposit the trust monies in a separate trust account.

E **[19]** However *Qimonda (supra)* does not support the proposition that retention monies as trust monies must be kept in a separate account. What was actually held was this at p. 283 (CLJ); p. 433 (MLJ):

> There is no requirement that the retention monies held by the appellant must be kept in a separate bank account. It does not change the status
F of the said monies as trust monies held for the specific purpose. There is also no requirement that the respondents (as contractor) must request for the monies to be kept in a separate bank account ... .

[20] In *Concorde* (*supra*), the plaintiff relied on the following passage at p. 133 where it was stated:

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> I do not think that an employer is entitled to have recourse on the trust fund of retention monies simply on the strength of his own belief that he has a good claim which entitles him so such monies. The court cannot countenance a situation where the employer would, in effect, be the judge in his own cause and able to say when he would make deductions from
H the retention monies ...
>
> As a matter of common sense, the employer can only permitted to deduct substantiated claims for liquidated amounts from the retention monies. How the employer will substantiate his claims depends on the circumstances.

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Certainly, the employer has an arguable case, judging from the material so far before the Court, but, nonetheless, its contentions about the main contractor's responsibility for defects and in relation to the other disputed matters are "speculative", in the sense that it is a matter for speculation whether the employer will ultimately succeed in proving its contentions. In the *Rayack* case, the court would not allow what it described as a "speculative" set-off to defeat the contractor's request that the retention monies should be set aside as a separate trust fund.

[21] The views in that aforesaid passage from *Concorde* (*supra*) was adopted in *ESPL* (*supra*) in p. 696. According to the plaintiff, this coupled with the proprietary right to the trust monies meant that plaintiff was entitled to the application sought. At p. 697 it was stated:

It is a principle of general application in a Court of Equity that specific relief will not be granted where monetary compensation is a sufficient remedy. However, as an exception, once an equitable proprietary title under a trust is established, equity presumes that monetary compensation is inadequate and will grant specific relief, even if the subject matter of the trust consists of pure personalty or a promise to create a trust. The decision in *Fletcher v. Fletcher* [1844] 67 ER 564 amply exemplifies this approach.

... The Plaintiff here was, beyond a doubt, under an obligation to pay into Account no. 1 all monies it received from Henz. That obligation was enforceable in Equity as a trust. The fact that it may have a mere contractual right of a set off against the defendant can make no dent in the cast iron armour of the trust imposed upon the plaintiff's conscience. That is a monetary claim that must await adjudication by the Court.

[22] However, as correctly pointed out by defendant's counsel, *Concorde*, *ESPL* and the other cases relied on by the plaintiff, the contracts in question contained a clear provision in creating a trust.

[23] In *Concorde* (*supra*) the relevant provision in condition 30(4) stated:

(a) The Employer's interest in any amounts so retained shall be fiduciary as trustee for the Main Contractor (but without obligation to invest), and the Main Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this Contract to deduct from any sum due or to become due to the Main Contractor.

[24] In *ESPL* (*supra*) cl. 27.1 stipulated that:

27.1 Sub-contractor will receive the payments made by Contractor and will hold the right to receive such payments as a trust fund to be applied first to the payment of labourers, suppliers, Sub-Sub-Contractors and others responsible for the Work justifying such payments, and all taxes and insurance applicable thereto; and Sub-Contractor will so apply the payments from Contractor.

[25] Thus it is not as a matter of course that the retention monies by virtue of being trust monies must be kept in separate accounts. *Qimonda* (*supra*) being a later case to *ESPL* (*supra*) has made the position clear. There must be grounds advanced to necessitate the keeping of separate accounts.

[26] The winding-up proceedings against the defendant is not ground for keeping the monies in separate accounts as the retention monies can be traceable. As *Qimonda* (*supra*) at p. 433 stated:

> [22] ... Thus, the retention monies cannot form part of the general assets of the appellant. In an appropriate case, the court can still order for the preservation or release of the retention monies even after winding up proceedings have been presented against the appellant or the appellant is in the process of liquidation ... .

[27] It is also relevant to note the winding-up proceedings were initiated by plaintiff itself. It follows that the plaintiff would be able to take steps to protect its interest in the course of any winding-up proceedings.

[28] Defendant's set off and counterclaim have to be allowed to run its course in the arbitration proceedings and it is not for the court to now say it is speculative (as per *Concorde*) or otherwise.

[29] Plaintiff had also relied on *In Re Benson* [1899] 1 Ch 39 that even where the trust has ceased, trust property ought to be preserved pending the disposal of the dispute. This does not in any way support its proposition that trust monies must be kept in separate accounts. Further, that case did not deal with retention money.

Conclusion

[30] Although the retention monies are trust monies, it does not necessarily mean the monies must be kept in separate accounts. For the reasons given above, plaintiff's application in encl. 1 was dismissed.